Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Credit Union National Association	)	GC Docket No. 02-278
Petition for Declaratory Ruling	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of	)	
1991	)	

Comments of Burke Law Offices, LLC in Opposition to Petition for Declaratory Ruling

filed November 7, 2017

Cell phones are uniquely personal. We carry them everywhere we go. They sit on our nightstands when we go to sleep, and are the first place we look when we wake up. They are with us at work, travel when we go on vacation, and join us in the car when we are driving to pick up the kids from school.

In contrast, an automatic telephone dialing system ("ATDS" or "autodialer") is uniquely impersonal. It is designed to systematically convey information to a large number of persons with minimal effort, without human intervention. A single mouse click on an autodialer causes thousands (or millions) of calls to be made; calls that must be answered manually, one-at-a-time, by consumers. The TCPA thus regulates the technology disparity between an ATDS' rote systematic calls, and the intimate and manual answering and listening process necessary for consumers to receive them.

In passing Section 227(b)(1)(A)(iii) of the TCPA, Congress recognized the tension between the intimacy of a cell phone and the inhuman nature of ATDS calls. The law is designed to prevent mass-scale communications to persons who have not requested them. Boiled down to its essence, the TCPA provides consumers with a choice as to who may contact them through use of automated communications to their cell phones. As Chairman Powell recognized in 2003:

> The TCPA is about tools. It gives consumers the tools they need to build a high and strong fence around their homes to protect them from unsolicited telephone calls and faxes. It also allows other consumers to have a lower fence or no fence at all, if they wish to take advantage of these commercial messages.

Separate statement of Chairman Michael K. Powell, Re: 2003 TCPA Order, 18 FCC Rcd. 14014, 14174 (July 3, 2003).

CUNA frames its petition in terms of corporate efficiency, but the TCPA is a ***consumer*** protection statute. The Commission has a duty to American consumers to protect consumer choice, which is the driving force behind this law. Accepting CUNA's position would eviscerate the choice that the TCPA was designed to protect, in favor of corporate efficiency.

CUNA complains that there is "uncertainty" under current law as to what the TCPA covers. This assertion is either disingenuous or uninformed. The current state of the law is clear and simple: automated informational calls to the cell phones of persons is permissible, as long as the sender has the "prior express consent" of the called party. This standard has been stated, time and time again, by the Commission.

In re Rules & Regs. Implementing the TCPA, 18 FCC Rcd. 14014, at ¶132 (2003), *In re Rules & Regs. Implementing the TCPA*, 23 FCC Rcd. 559, at ¶ 13 (2008); *In re Rules & Regs. Implementing the TCPA*, 27 FCC Rcd 15391, at ¶ 2 (2012); *In re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961, at ¶ 9 (2015).

CUNA's petition would have a disastrous impact on consumers' rights to be free from unwanted automated calling, and it should therefore be denied.

A. Accepting CUNA's petition will strip consumers' freedom to choose what automated calls they receive.

Congress passed the TCPA to protect consumers from receiving intrusive and unwanted calls,[3] including with respect to calls made using an autodialer or an artificial or prerecorded voice.[4] To that end, the plain text of the TCPA prohibits making any non-emergency call using an autodialer or an artificial or prerecorded voice to

[3] *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 268 (3d Cir. 2013) (citing *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012)); *see also Mims*, 132 S. Ct. at 744 ("Voluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes—prompted Congress to pass the TCPA.") (internal citations omitted); TCPA, Pub. L. No. 102-243, § 2(5-6) (1991), *codified at* 47 U.S.C. § 227 (containing Congressional findings that, inter alia, "[u]nrestricted telemarketing ... can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety[,]" and that "[m]any customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers"); S. Rep. No. 102-178, 6 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1974 ("The bill would accomplish the following: ... ***ban all autodialed calls, and artificial or prerecorded calls, to ... cellular phones***.") (emphasis added).

[4] *See, e.g.,* TCPA, Pub. L. No. 102-243, § 2(13) ("[T]he evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call[.]").

numbers assigned to a cellular telephone service, unless the caller had the prior express consent of the called party.[5]

The farther the Commission strays from the statutory language by granting piecemeal exemptions industry-by-industry, the more complicated compliance and enforcement ultimately becomes, and the less self-determination is afforded to consumers. We ask the Commission to reject CUNA's self-interested, faux-paternalism about what is in consumers' best interest, and to confirm consumers' right to decide for themselves what automated calling they want, if any. There is nothing stopping CUNA's members from simply obtaining consent before autodialing cell phones.

CUNA's petition rests on a ridiculous proposition: "Credit unions can't figure out whether they can robocall consumers without consent, so the Commission should just exempt them from the TCPA's prior express consent requirement."[6] The law isn't difficult to understand: If a credit union wants to call consumers' cell phones using automatic telephone dialing or artificial/prerecorded voice technology, it should first make sure it has those consumers' express consent to do so.[7] This basic aspect of the law hasn't changed in more than two decades; CUNA's request for an industry-wide exemption to this fundamental TCPA requirement lacks any legitimate basis. If

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[5] 47 U.S.C. §§ 227(b)(1)(A)(iii) and 227(b)(1)(B) (emphasis added). That the caller had the called party's "prior express consent" is an affirmative defense to be proven by the defendant. *See, e.g., In re Rules & Regulations Implementing the TCPA*, 23 FCC Rcd 559, 565, para. 10 (2008) ("[W]e conclude that the creditor should be responsible for demonstrating that the consumer provided prior express consent.").

[6] Pet. at iv.

[7] 47 U.S.C. § 227(b)(1)(A)(iii).

consumers really want to receive these calls as CUNA self-servingly suggests, they'll consent to receive them, meaning that the risk of litigation is limited. And even then, credit unions can avoid liability by simply maintaining the good practices other industries have been able to adhere to. Laziness or the desire to simply get away with maintaining poor consent practices are **not** valid reasons to remove longstanding consumer protections, and CUNA's petition should therefore be denied. To do otherwise will only invite further systematic and automatic calling to people who had no expectation of such in the first place.

Consumers are lucky the TCPA has been in place since 1991. Other technology-driven industries that lack similar controls have gotten out of hand. Streitfeld, David, *Tech Giants, Once Seen as Saviors, Are now Viewed as Threats*, New York Times (October 12, 2017).[8] Autodialers can make hundreds of thousands – or even millions – of calls per day. Absent consent requirements, it would be very easy for calling to get out of hand; if this happened, our cell phones would be rendered useless, because consumers would be receiving call after call from one company or the next for informational messages that the caller deems "important." The undersigned receives approximately three calls a day on his cell phone from telemarketer scofflaws, sometimes more. In CUNA's world, there can be no such thing as a "secret" cell phone number that is reserved for close colleagues, friends and family. Absent a consent requirement, there

[8] Available at https://www.nytimes.com/2017/10/12/technology/tech-giants-threats.html?_r=0.

cannot be any such thing as a "work" cell phone maintained, for example, by a doctor who wishes only to receive emergency calls from the burn unit. A high school student that has a savings account at a credit union will not have control over whether CUNA members call her on her emergency-only flip-phone during school hours.

The TCPA is the only buffer capable of protecting consumers as to these – and myriad other – real-life private situations.

B. This Commission's precedent requires that CUNA's petition be denied.

CUNA makes it clear that it wants this Commission to exempt **all** non-telemarketing automated calls to wireless numbers from the TCPA's prior express requirement, including not only exigent circumstances calls, but debt collection calls, as well.[9] But this Commission has, after careful, well-reasoned consideration, *already ruled* on whether to exempt calls made by financial institutions: Its 2015 Declaratory Ruling and Order refused a wholesale exemption, and instead instituted a limited exemption for non-telemarketing, free-to-end-user calls strictly limited to exigent circumstances—i.e., data breach alerts or calls intended to prevent or address fraudulent transactions or identify theft—which specifically excluded calls made for a debt collection purpose from the exemption.[10] CUNA identifies no reason why credit unions should be afforded a *further* exemption for their calls, or how the debt

[9] Pet. at 4.

[10] *In re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961, at ¶ 138 (2015) ("*2015 Omnibus Ruling*").

collection calls they make are somehow excusable despite this Commission's own express findings regarding the frequent harassment and abuse thrust upon customers and non-customers alike in relation to debt collection calling:

> [T]here is clear, unrebutted evidence that these calls pose a unique concern for consumers. Record evidence shows that when consumers complain about debt collection calls, a third of the time they complain that there is no debt to be collected, including that they never owed the debt. More than one of every five complaints is about communications tactics, including frequent or repeated calls; obscene, profane or other abusive language; and calls made after written requests to stop. And the record contains evidence, also unrebutted by Petitioners, that such calls sometimes lack a means for consumers to ask that they stop, and can even instruct the consumer to hang up if they are not the debtor, or that callers may have a policy to not speak to anyone other than the debtor.[11]

Credit unions' debt collection calls are just as harassing and unwanted as the debt collection calls of other industries, and granting a wholesale exemption to the credit union industry will only harm consumers' privacy interests the TCPA was enacted to protect. There is no special exigency or other basis for expanding the Commission's current exemption for financial institutions.

Moreover, as CUNA admits,[12] the Commission itself eliminated the residential landline EBR telemarketing exemption in 2012, citing firm consumer opposition and the desire to comport more closely with the FTC's rules.[13] The truth is that many consumers do not want to receive debt collection and other so-called "informational" calls, even when they *do* have an established business relationship with a company—

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11 *2015 Omnibus Ruling*, at ¶ 79.

12 Pet. at 8.

13 *In re Rules & Regs. Implementing the TCPA*, 27 FCC Rcd. 1830, at ¶¶ 35–43 (2012).

whether because the business sends too many messages, the consumer does not find the information helpful, the contact is really just a pretext for telemarketing, the debt collection or payment-reminder calls are harassing, or otherwise. CUNA's petition seeks to step back from this Commission's precedent, and to upend the *status quo* in favor of unrestrained debt collection and other so-called "informational" robocalling.

The *status quo* permits CUNA members to robocall people who want such calls to their heart's content. Changing this playing field might *increase* CUNA members' operations' efficiency, but removing the choice as to whether to receive such calls will dramatically *decrease* the efficiency of individual consumers.

C. Conclusion

Granting CUNA's petition will hurt consumers' privacy interests by subjecting them to debt collection, inane, and other unwanted non-telemarketing calling, while eviscerating the consumer-choice policy behind the TCPA. The Commission has already granted financial institutions a limited exemption to the TCPA's prior express consent requirement, and there is no good reason to expand it further. The TCPA's consumer protections need to be strengthened, not reduced, and for the reasons explained above, we respectfully request that the Commission protect consumer privacy and **deny** CUNA's petition.

Respectfully submitted,

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[14] Burke Law Offices, LLC recognizes that these comments are filed after the November 6, 2017, deadline, and respectfully requests that they be accepted *instanter*, and considered on their merits.